

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

United States of America :
 :
 v. : Case No. 2:03-cr-92
 :
 Irvin Lee Pope :

OPINION AND ORDER
(Doc. 76)

Irvin Lee Pope, proceeding *pro se*, has filed a motion entitled "First Amendment Petition." (Doc. 76.) Mr. Pope is a federal inmate currently serving a sentence for a 2004 conviction for possession of a firearm as a previously-convicted felon. In his motion, filed on October 11, 2013, Mr. Pope seeks an order declaring his conviction unconstitutional, reversing the judgment against him, and releasing him from federal custody (Doc. 76 at 3.) He argues he was deprived of his Sixth Amendment right to trial by jury when he was denied the opportunity to present factors related to sentencing enhancements to be proven beyond a reasonable doubt, contrary to the U.S. Supreme Court's recent decision, *Alleyne v. United States*, __U.S.__, 133 S.Ct. 2151 (2013). (Doc. 76 at 1.) The Government filed a response requesting that the Court transfer the case to the Second Circuit for certification pursuant to § 2255(h), or in the alternative, deny the motion. (Doc. 78 at

3.)

The Court construes Mr. Pope's motion as a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. He does not allege any facts stating a violation of his First Amendment rights and instead seeks to challenge his conviction and have his sentence vacated on Sixth Amendment grounds. Therefore, Pope's motion constitutes his third § 2255 motion. The first motion was denied on the merits in 2007, and he did not appeal. The second motion was certified to the Second Circuit by this Court in 2010 (Doc. 58) pursuant to 28 U.S.C. § 2255(h). On March 15, 2010, the Second Circuit issued an Order denying Mr. Pope's application. *Irvin Lee Pope v. United States*, No. 10-174-op, slip op. at 1 (2d Cir. Mar. 15, 2010).

Pope's first § 2255 motion was denied on the merits, and therefore this motion is "successive" and cannot be filed without permission from the Court of Appeals. 28 U.S.C. § 2255(h) ("A second or successive motion must be certified as provided in section 2244"). The Second Circuit has instructed that when a district court receives a second or successive § 2255 motion, it should transfer the motion to the Court of Appeals pursuant to 28 U.S.C. § 1631. *See Liriano v. United States*, 95 F.3d 119, 122-23 (2d Cir. 1996). The Circuit will certify the motion if it contains

"newly discovered evidence" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h). If certified, the motion may then be heard by this Court.

Accordingly, the Court finds that Pope's § 2255 motion is successive, and TRANSFERS the motion (Doc. 76) to the Second Circuit pursuant to 28 U.S.C. § 1631.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 25th of March, 2014.

/s/ William K. Sessions III
William K. Sessions III
Judge, United States District Court